INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	1
Statutes and Army Regulations	2
Statement	2
Specifications of assigned errors to be urged	10
Summary of argument	11
Argument	12
Conclusion	12
	21

CITATIONS

Cases:	
Atchison, T. & S. F. R. R. Co. v. *United States*, 55 Ct. Cls. 339	14
Illinois Central R. R. Co. v. *United States*, 52 Ct. Cls. 53	13, 16
Emergency Fleet Corporation v. *Western Union Telegraph Co.*, 275 U. S. 415	20
Oregon-Washington R. R., etc., Co. v. *United States*, 58 Ct. Cls. 645	15, 16
Statutes, etc.:	
Act of March 3, 1863, c. 98, sec. 3, 12 Stat. 772, 773	2
Act of July 25, 1866, c. 242, sec. 5, 14 Stat. 239, 241	2
Act of July 27, 1866, c. 278, sec. 11, 14 Stat. 292, 297	3
Act of June 18, 1878, c. 263, sec. 8, 20 Stat. 145, 150; U. S. C., title 10, sec. 801	4
Act of March 2, 1907, c. 2511, 34 Stat. 1158, 1166	5
Act of May 11, 1908, c. 163, 35 Stat. 106, 108; U. S. C., title 10, secs. 802, 803	6
Act of March 3, 1909, c. 252, 35 Stat. 732, 742; U. S. C., title 10, sec. 804	5
Act of March 23, 1910, c. 115, 36 Stat. 243, 254; U. S. C., title 10, secs. 808, 811	5, 6
Act of April 27, 1914, c. 72, 38 Stat. 351, 365; U. S. C., title 10, sec. 807	5
Army Regulations—	
A. R. 605-130, 3/15/22	4
A. R. 30-965, 6/1/23, pars. 25, 27	7
A. R. 1913, 1917—	
Par. 1095	9
Par. 1096	8
Par. 1098	6-7
Par. 1272	8
Par. 1273	8
23 Comp. Dec. 480	14

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 440

THE UNITED STATES, PETITIONER

v.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no opinion. The Findings of Fact and Conclusion of Law upon which the judgment is predicated (R. 13–16) have not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered June 18, 1928. (R. 16.) Petition for certiorari was filed September 14, 1928 (R. 16), and the writ was granted by this Court on October 29, 1928. Jurisdiction of this Court rests on the Act of February 13, 1925.

THE QUESTION

The sole question involved is whether, under the provisions of the land-grant Acts and the land-grant equalization agreement, the United States in making payment to land-grant railroads and to other carriers which have agreed to equalize their charges with the rates paid to land-grant roads, is entitled to land-grant deductions from commercial charges for the transportation of the authorized number of private mounts of Army officers when such mounts are used in the military service of the United States and are transported at Government expense on change of station orders of such officers.

STATUTES AND ARMY REGULATIONS

The three general provisions in the land-grant Acts which state the conditions under which troops and "property" of the United States shall be transported over land-grant or bond-aided railroads are as follows:

The Act of March 3, 1863 (c. 98, Sec. 3, 12 Stat. 772, 773), provides that:

> • • • said railroads and branches shall be and remain public highways, for the use of the Government of the United States, free from all toll or other charge upon the transportation of *any property* or troops of the United States. (Italics ours.)

The Act of July 25, 1866 (c. 242, Sec. 5, 14 Stat. 239, 241), provides that:

> * * * said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.

The Act of July 27, 1866 (c. 278, Sec. 11, 14 Stat. 292, 297), provides that:

> * * * said * * * railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

The several Acts of Congress providing for the number of authorized mounts of Army officers, money allowance to officers owning their mounts, transportation and maintenance thereof, and for their purchase in lieu of transportation, are as follows:

AUTHORIZED NUMBER OF MOUNTS

> * * * and forage in kind may be furnished to the officers of the Army, by the Quartermaster's Department, only for horses owned and actually kept by such officers in the performance of their official military

duties when on duty with troops in the field or at such military posts west of the Mississippi River, as may be from time to time designated by the Secretary of War, and not otherwise as follows:

To the general five horses;
To the lieutenant general four horses;
To a major general three horses;
To a brigadier general, three horses;
To a colonel, two horses;
To a lieutenant colonel, two horses;
To a major, two horses;
To a captain (mounted), two horses;
To a lieutenant (mounted), two horses;
To an adjutant, two horses;
To a regimental quartermaster, two horses.

(Act of June 18, 1878, c. 263, Sec. 8, 20 Stat. 145, 150; U. S. C. Title 10, Sec. 801; AR. 605-130, 3/15/22.)

TRANSPORTATION AND MAINTENANCE OF MOUNTS

• • • and for the authorized number of officers' horses, including bedding for the animals; and nothing in the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year nineteen hundred and eight, or any other Act, shall hereafter be held or construed so as to deprive officers of the Army, wherever on duty in the military service of the United States, of forage, bedding, shoeing, or shelter for their authorized number of horses, or of any means of transportation or maintenance therefor for which pro-

vision is made by the terms of this Act * * * (Act of March 2, 1907, c. 2511, 34 Stat. 1158, 1166; Act of March 3, 1909, c. 252, 35 Stat. 732, 742; U. S. C. Title 10, Sec. 804.)

* * * and hereafter transportation may be furnished for the owned horses of an officer, not exceeding the number authorized by law, from point of purchase to his station, when he would have been entitled to and did not have his authorized number of owned horses shipped upon his last change of station, and when the cost of shipment does not exceed that from his old to his new station. (Act of March 23, 1910, c. 115, 36 Stat. 243, 255; U. S. C. Title 10, Sec. 808.)

The Act of April 27, 1914 (c. 72, 38 Stat. 351, 365; U. S. C. Title 10, Sec. 807), among other things provides that—

Provided further, That hereafter private mounts of officers in excess of the authorized mounts may be shipped on Government bill of lading with authorized mounts, and reimbursement collected for transportation charges on such excess mounts * * *.

MOUNTS FURNISHED OFFICERS BELOW GRADE OF MAJOR AND MONEY ALLOWANCE TO OFFICERS OWNING THEIR MOUNTS

* * * that hereafter the United States shall furnish mounts and horse equipments for all officers of the Army below the grade of major required to be mounted, but in case any officer below the grade of major required to be mounted provides himself with suitable mounts at his own expense, he shall

receive an addition to his pay of one hundred and fifty dollars per annum if he provides one mount, and two hundred dollars per annum if he provides two mounts. (Act of May 11, 1908, c. 163, 35 Stat. 106, 108; U. S. C. Title 10, Secs. 802 and 803.)

PURCHASE OF MOUNTS IN LIEU OF TRANSPORTATION

* * * that hereafter when a mounted officer is ordered * * * to make a change of station in the United States in which the cost of transportation for his authorized number of owned horses exceeds the sum at the time allowed for that purpose in the Army Regulations, the Secretary of War is authorized, under such regulations in respect to inspection and valuation as he may prescribe, in his discretion to permit the purchase of said horses by the Quartermaster's Department, at a price not exceeding the average contract price paid for horses during the preceding fiscal year, the exact price to be fixed by a board of officers. (Act of March 23, 1910, c. 115, 36 Stat. 243, 254; U. S. C. Title 10, Sec. 811.)

The various provisions of Army regulations pertaining to the authorized number of private mounts of Army officers required to be mounted are as follows:

TRANSPORTATION OF PRIVATE MOUNTS

PAR. 1098, AR. 1913, 1917. The Quartermaster Corps will transport for officers changing station * * * the number of

horses for which they are legally entitled to forage, and an attendant to accompany the horses when necessary, subject to the following restrictions:

1. That the expense to the United States shall not exceed $100 for each horse transported.

* * * * *

3. That the horses are owned by the officer and are intended to be used by him at his new station in the public service.

PAR. 25. AR 30–965. 6/1/23. *When authorized.*—a. The authorized number of private mounts of officers designated as mounted officers (paragraphs 1 and 2, AR 605–130), together with an attendant, when necessary, will be transported at Government expense in the following cases, *provided the horses are owned by the officer, are intended to be used by him at his new station, and are suitable mounts*, viz:

(1) Officers changing station, subject to the restrictions contained in paragraph 26.

(2) Graduates of the United States Military Academy, who, upon first assignment to station, will be designated as mounted officers (paragraph 1, AR 605–130). (Italics ours.)

PAR. 27. AR. 30–965, 6/1/23. *Certificate required.*—a. All private mounts turned over to a quartermaster for shipment must be accompanied by a certificate, signed by the owner—

(1) Stating that the mounts are authorized mounts and *are intended for use in the public service at his new station.* (Italics ours.)

MAINTENANCE OF PRIVATE MOUNTS

PAR. 1096. AR. 1913, 1917. * * * Authorized private mounts of officers will similarly at Government expense be stabled, shod, foraged, and supplied with veterinary treatment and medicine. * * * (Par. 3, AR. 605–130, 3/15/22.)

PAY FOR USE OF PRIVATE MOUNTS FURNISHED BY OFFICERS BELOW GRADE OF MAJOR

PAR. 1273. AR. 1913, 1917. Officers below the grade of major, required to be mounted, whether permanently or temporarily, will be furnished with a proper mount by the Quartermaster Corps. Such officers may, however, provide themselves with suitable mounts at their own expense and of their exclusive ownership, and any officer of the grades indicated who so provides himself shall receive an addition to his pay of $150 per annum if he provides one mount and $200 per annum if he provides two mounts. (AR. 35–1720, 1/6/26.)

STANDARD FIXED FOR PRIVATE MOUNTS

PAR. 1272. AR. 1913, 1917. The private mounts, owned and provided by officers of all grades in the Army, for which the Government expends public funds in the matter

of maintenance and care, shall be of a standard fixed by the Secretary of War from time to time. (Changes, AR. No. 76, 7/31/18.)

PURCHASE AND SALE OF MOUNTS

PAR. 1095. AR. 1913, 1917, as changed by Changes, AR. 87, 4/3/19. * * * When a mounted officer purchases a horse under the provisions of this paragraph, he shall not be permitted to sell him, prior to the expiration of one year from the date of purchase from the Government, except to another officer at a price to be agreed upon between seller and buyer or back to the Government at a price to be determined in the manner indicated above; provided, that where an officer has requested authority to sell a horse back to the Government under the provisions of this paragraph and the board convened to examine the horse finds that he is more than 10 years of age or that he is no longer fit for an officer's mount nor for the military service by reason of unsoundness or defects, the officer shall then be free to dispose of the said horse as he may see fit. The limitation of this paragraph on the subsequent sale of a horse purchased from the Government shall apply, for the period of one year from the date of purchase from the Government, to any officer who may become the owner of such horse. (Par. 3, AR. 605–140, 6/30/28.)

STATEMENT

This is a suit to recover money which was deducted by the accounting officers of the United States from freight charges claimed by the respondent for the transportation of the authorized (private) mounts of Army officers changing station and of enlisted men accompanying said mounts as attendants.

The findings of the Court of Claims show that under certain statutes lands were granted in aid of railroads and such roads were required to transport troops and property of the United States at not exceeding 50 per cent of the rates paid by private parties (R. 13); that at and prior to the times of the services involved in this suit railroad companies generally, including respondent, had agreed to accept for transportation of property of the United States moved by the Quartermaster Department of the Army and for which the Government was lawfully entitled to reduced rates over land-grant roads the lowest net rates lawfully available as derived through deductions on account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission, applying from the point of origin to destination at the time of the movement (R. 14).

The Government, through the Quartermaster Department of the Army, shipped on Government bills of lading a number of horses which were the authorized (private) mounts of officers changing station.

For this service respondent as last carrier rendered its bills at full commercial rates. In some instances the disbursing officers of the Government paid the full commercial fare and later the Government accounting officers deducted sums based upon alleged appropriate land-grant distances. In other instances the accounting officers of the Government made direct settlements with respondent upon such bills and deducted the alleged appropriate land-grant allowances. (R. 14.) It has been the uniform practice of the administrative and the accounting officers of the Government to make land-grant deductions in such cases. (R. 15.) The Court of Claims held this improper and rendered judgment against the Government in the sum of $475.17 (R. 15), the amount of such land-grant deductions upon the transportation of the authorized mounts.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

(1) The Court of Claims erred in giving judgment in favor of the respondent, and in effect concluding that the United States has no "property" right or interest in and to the authorized private mounts of Army officers used in the military service which entitles the Government to make and retain land-grant deductions from commercial charges for transportation of such mounts at Government expense on change of station of the officer.

(2) In concluding that the words "property of the United States" as used in the land-grant statutes and in the land-grant equalization agreement

must be construed as relating to property the legal title and absolute ownership of which are actually lodged in the United States at the time it is transported at Government expense.

SUMMARY OF ARGUMENT

Under existing regulations, which have the implied approval of Congress, the United States is obliged to bear the expense of transporting authorized private mounts of officers on change of station.

The Army Regulations allowing officers to furnish their own mounts, and providing for their care, feeding, and transportation at Government expense, show that the United States, while not the owner of the horses, has a property interest in them, and a right to require the officers to use them in the discharge of their duties, and they are property of the United States within the meaning of the Land Grant Acts. To be such, it is not necessary that the United States should be the absolute owner. It is sufficient if the property transported is in use by the United States under some arrangement with the owner giving the United States the right to the use.

ARGUMENT

We have been unable to find any statute directly authorizing the payment by the Government for transportation of authorized private mounts of Army officers upon change of station, but Army Regulations for years past have provided for the

payment of such transportation by the Government, and the accounting officers of the Government have consistently recognized and adhered to the liability of the Government to pay for the same, and where the transportation occurred over land-grant roads, land-grant deductions have been made.

The provisions of the Act of April 27, 1914 (38 Stat. 351, 365), authorizing the transportation of private mounts of Army officers in excess of authorized mounts upon Government bills of lading, and providing for the reimbursement to the Government of the cost of transportation of such excess mounts, is a recognition by Congress of the existence, the validity and the propriety of the Army regulation authorizing the payment by the Government of the transportation cost of the authorized private mounts, and is an implied approval by Congress of such regulation. Both of the portions hereinabove set out of the Act of March 23, 1910 (36 Stat. 243 at 254 and 255), would seem to have the same effect. We think it can not be seriously contended that the cost of such transportation should fall upon the Government.

This matter was first brought to the attention of the courts in the case of *Illinois Central Railroad Company* v. *United States* (52 Ct. Cls. 53), which was decided January 15, 1917. In that case the railroad company brought suit to recover land-grant deductions from the transportation charges on two horses, the authorized private mounts of an Army

officer who had been ordered from duty in Texas to duty oversens, the horses, in accordance with Army regulations, having been transported to a place designated by the army officer for safe keeping during his absence. The Court of Claims considered the case and referred in its opinion to the Act of April 27, 1914, but concluded that in the absence of a statute authorizing the payment of such transportation, a regulation of the War Department could not bind the Government, and therefore the Government was not liable for any transportation cost of these horses and, of course, the plaintiff could not, therefore, recover the land-grant deductions.

Notwithstanding this opinion by the Court of Claims the Comptroller of the Treasury (23 Comp. Dec. 480), on February 21, 1917, held that in the case of an officer changing station his authorized private mount should be transported at Government expense, less land-grant deductions, if any. Some attempt is made to distinguish the case before the Comptroller from the *Illinois Central case* upon the ground that the case before the court was one involving an officer ordered to duty beyond the seas, while the case before the Comptroller was an officer changing station.

In the case of *Atchison, Topeka and Santa Fe Railroad Company* v. *United States* (55 Ct. Cls. 339) the Court of Claims, on May 10, 1920, considered the claim of the railroad to recover the amount of land-grant deductions made from trans-

portation charges of authorized private mounts of Army officers. The court pointed out that the facts did not show whether these officers were on a change of station or otherwise, but, since the case had been argued upon the theory that they were upon a change of station, the decision would proceed accordingly. The court held that the regulation of the War Department, in the absence of a statute specifically authorizing the payment of such cost by the Government could impose no liability upon the Government, and as the Government was not obliged to pay any of the cost of such transportation, of course the plaintiff could not recover any of the land-grant deductions. The *Illinois Central case* is cited as authority. In the case of *Oregon-Washington Railroad, etc. Co.* v. *United States* (58 Ct. Cls. 645) the Court of Claims on November 19, 1923, determined that the Government was bound to pay for the transportation of the authorized private mounts of Army officers on change of station, but held that, since the horses were not the property of the Government, land-grant deductions were improper in such cases. A judgment was therefore awarded to plaintiff for the land-grant deductions.

The court concluded that, in view of the situation of Army officers, the necessity for their frequent removal from place to place, as well as the demand that their authorized private mounts accompany them, and in further view of the long

standing widely published and promulgated regulations of the Army authorizing the payment of the transportation cost of such mounts, it was inconceivable that Congress was ignorant of the situation and therefore must be assumed to have approved of the liability of the Government to pay such cost. The Act of April 27, 1914, is also cited as an implied approval by Congress. The court further says that the *Illinois Central case* did not involve a change of station, and that in the *Atchison case* it did not appear that the transportation was on a change of station.

As set out in the petition for certiorari in this case, when the *Oregon-Washington case* was decided the question as to whether the Government should seek an appeal was presented to a former Solicitor General and he decided against it, saying "Amount too small to justify expense, especially as point involved doubtful."

All during this time the administrative and accounting officers of the Government have proceeded to pay for the transportation of the authorized private mounts of Army officers on change of station and have made land-grant deductions where the transportation occurred over land-grant or equalizing carriers. In the present case the Court of Claims followed the *Oregon-Washington* decision and rendered judgment against the Government without opinion.

The statutes heretofore set out show that certain officers of the Army are required to have a certain

number of horses. Provision is made for the furnishing of these horses by the Government to officers below the grade of major, but provision is also made that in the event the Army officer below the rank of major desires to furnish his own mounts, if such horses comply with the rules and regulations and meet the inspection of the Army as to such matters as age, physical condition, and fitness to perform the necessary duties, the officer will be permitted to furnish his own horses. In the event he furnishes such horses he shall, in addition to his regular pay, receive the sum of $150 per year if one horse is furnished and $200 per year if two horses are furnished.

The statutes also provide that for authorized private mounts the Government shall provide the feed, bedding, stabling, and veterinary service if and when necessary. In other words the Government furnishes everything necessary for the care and maintenance of such horses. During this period the officer can not remove the horses from his place of duty, but they must be always available for service as mounts of such officer in connection with his official duty. By this arrangement the Government has hired from the Army officer the private mount. The Government has become a bailee of that horse, the terms of the bailment being provided by the applicable statutes and Army regulations.

The land-grant statutes and the Appropriation Acts made in pursuance thereof constitute a contract

or agreement between the United States and the carrier accepting such land grants. The railroad company, in consideration of grants of land to it by the Government agrees that it will carry the "property or troops of the United States" at reduced rates, and in accordance with the powers given to the Government by that contract the Government, in the Appropriation Acts, has provided for the amount of such reduction. By the equalization agreement the carriers of the United States, generally, including the respondent herein, agreed that for transportation of property moved by the Quartermaster Corps of the Army and for which the Government is lawfully entitled to reduced rates over land-grant roads, the carrier would accept such reduced rates.

The Government does not contend that the United States is the absolute owner of the horses in question. It does contend that such horses are "property" of the United States within the meaning of the land-grant statutes. The Government has a special property interest therein. It is well recognized that a bailee has many rights in the property which is the subject of bailment. The rights, of course, are determined and limited in accordance with the terms of such bailment.

In the case now before the Court it is apparent that under the terms of bailment certain obligations and duties with respect to the payment of hire, the furnishing of necessary feed, etc., and the general care for the horses, are imposed upon the Govern-

ment. The Government, in return, has a right to have the horses always available during the period of bailment for the services required by the statutes or Army regulations of mounted officers. The necessity for the horses accompanying the officer on a change of station so that they may be available for the official use of the officer, both before leaving the old station and after arrival at his new station, is also very apparent. Under the regulations above cited the officer can not even dispose of the authorized mount prior to the expiration of a year from the date of the purchase by him from the Government, except to another officer at a price to be agreed upon, or back to the Government, unless the horse has been determined to be unfit for further Government service.

It is respectfully submitted that the Government has certain rights in the authorized private mount of an officer. Such rights are property rights and within the strict letter of the law the horse may be said to be, under the terms of the bailment, for the time being, the property of the United States, and in the transportation thereof the Government should be given the benefit of land-grant deductions.

But we do not deem it necessary to determine whether the horse is the property of the Government in the ordinary sense that such term is used, as we contend that the horse is the property of the Government as the term is used in the land-grant statutes and within the meaning, purpose, and intent of such statutes. We have here the case of

the hiring of a horse by the Government. It can not be seriously contended that in case the Government hires property to be used in Federal service, and in the performance of that Federal service it is necessary to transport such property, the Government should pay the cost of such transportation. Occasions may often arise where the Government finds it more desirable to rent property than to purchase the same. It may well be that in case of national emergency such an arrangement would be especially desirable.

There is nothing in the land-grant statutes indicating an intent by the parties to these land-grant contracts that when the words "property of the United States" were used it was intended to include only that property to which the United States held the absolute legal title. There is every reason to believe that it was the intent of Congress as well as the intent of the carriers that this term should include property under the control of the United States which was used in the performance of governmental service, and which was transported by the Government in connection with such official service. The land-grant statutes should be given a broad and liberal meaning in order to carry out the apparent intent thereof. See *Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, 275 U. S. 415.)

CONCLUSION

For the reasons above set forth it is respectfully submitted that the Government is entitled to the benefit of land-grant deductions in the transportation which is involved in this suit, and that the decision by the Court of Claims is erroneous and should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.

FEBRUARY, 1929.

○